No. 116 ~~861~~

Supreme Court of the United States

OCTOBER TERM, 1948.

NANCY BRADBURN, *nee* YARHOLA,
Petitioner,

VERSUS

SHELL OIL COMPANY, INCORPORATED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND SUPPORTING BRIEF

CREEKMORE WALLACE,
B. E. HARKEY,
810 Braniff Building,
Oklahoma City 2, Oklahoma,
Counsel for Petitioner.

June, 1949.

OTTERBACK TYPESETTING CO., 13 SOUTH WALKER, OKLAHOMA CITY, OKLA., PH. 2-0750

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF MATTER INVOLVED

This petition challenges the correctness of the decision of the Circuit Court of Appeals, Tenth Circuit, relating to the effect of and validity of certain conveyances executed by a fullblood Creek Indian devisee member of the Five Civilized Tribes. Said conveyances were executed subsequent to the effective date of the Act of Congress, April 12, 1926 (44 Stat. 239). The conveyances were not approved by the County Court of Oklahoma having jurisdiction of the settlement of the estate of the deceased allottee or testator. Section 9 of the Act of Congress of May 27, 1908 (35 Stat. 312), as amended by Section 1 of the Act of Congress April 12, 1926 (44 Stat. 239).

The Circuit Court below in the judgment here questioned, held: [1]

1. That the Secretary's original approval of the oil and gas mining lease executed by the allottee in 1912, operated to remove the restrictions on the payment of the oil and gas royalties reserved in said lease to the allottee. Section 2 of the Act of Congress May 27, 1908 (35 Stat. 312), authorized the Secretary of the Interior to promulgate rules and regulations for the sale and approval of oil and gas mining leases on lands belonging to restricted members of the Five Civilized Tribes. The court below held that the Secretary's approval of the oil and gas lease was in effect a removal of restrictions and the land remained unrestricted unless restrictions were reimposed by the Secretary of the Interior. The court below further held that the amendment of April 12, 1926 (44 Stat. 239)

> "did not have the effect of reimposing restrictions on receipt of royalties which had heretofore been restricted only by regulations of the Secretary of the Interior under the 1908 Act. We said that the 1926 Act[2] 'in no sense impinged on the right to receive payment of royalties under oil and gas leases, the restrictions upon which had been removed by the Secretary of the Interior and not reimposed by him before the effective date of the 1926 Act'."

This action was brought by Nancy Bradburn, formerly Yarhola, a fullblood Creek Indian, Roll No. 4973, daughter and devisee of Linda Yarhola, fullblood Creek

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[1]The opinion of the court below is printed in the record at page 461.

[2]Quoting from **Chisholm v. House**, 160 Fed. (2d) 632.

Roll No. 4971. Linda Yarhola was allotted certain lands in Creek County, Oklahoma, upon which an oil and gas mining lease was taken February 12, 1912, and approved by the Secretary of the Interior in conformance with Sections 1 and 2 of the Act of Congress May 27, 1908 (35 Stat. 239). By various assignments, all approved by the Secretary of the Interior, the lease was acquired by Shell Oil Company, Incorporated, respondent. The lands were developed for oil and gas and produced oil and gas in large quantities. All of the proceeds from the reserved one-eighth royalty were paid to the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, for the use and benefit of the allottee; Linda Yarhola died testate February 5, 1917, a resident of Okmulgee County, Oklahoma, and among other provisions in her will, devised her allotted land one-fifth to Cussehta Yarhola, her husband, and two-fifths each to Nancy and another daughter, Lessey. The will was admitted to probate in the County Court of Okmulgee County, Oklahoma, and when said estate was closed proper orders of distribution were made and title to the two-fifths devised interest in said allotment vested in petitioner.

Several years prior to the date of the order of distribution, petitioner had been declared incompetent by the County Court of Okfuskee County, Oklahoma, and a legal guardian had been appointed for her, and upon receipt of her two-fifths interest in said allotment, and upon execution of proper division orders and transfer orders by her guardian, the income from her devised interest in said allotment was paid to said guardian. In June, 1924, petitioner was restored to competency by an order and judgment of the County Court of Okfuskee County, Oklahoma,

and on the date of her restoration to competency petitioner executed an express trust vesting title in all of her property, including her devised two-fifths interest in said allotment, in the trustees.

The original trust agreement was for a term of seven years. In 1925, the term was extended to twenty-one years. On December 19, 1929, one of the trustees resigned and a conveyance was executed by petitioner and her trustees vesting title in all of her estate in the new trustees. Upon execution of division orders and transfer orders furnished by the respondent, the income from the two-fifths of the one-eighth reserved royalty in said allotment was paid by the respondent to the new trustees.

In December, 1937, the trustees terminated the trust by quit-claiming back to Nancy, whereupon she conveyed said property in trust to Roy Bradburn for a term of ten years. Upon execution of division orders and transfer orders the respondent paid to the new trustee the income from the two-fifths of the one-eighth royalty owned by petitioner. Petitioner's two-fifths of the Linda Yarhola allotment constituted part of the property conveyed in each of the foregoing deeds, none of which were approved by any County Court.

Petitioner sought to recover from Shell Oil Company, Incorporated, respondent, for all royalties paid to trustees subsequent to the execution of the conveyance and division orders to the new trustees in 1929, and the trustee named in the 1937 trust conveyance, on the theory that the Act of April 12, 1926, reimposed restrictions on petitioner's devised two-fifths interest in said allotment and all royalty

income therefrom; that in the absence of approval of said conveyances by the County Court in Oklahoma having jurisdiction of the settlement of the estate of the allottee or testator, said conveyances were void.

This action was commenced by Nancy Bradburn by filing a petition in the State District Court of Tulsa County, Oklahoma. The Government intervened after said cause was removed from the State Court. Trial was had in the United States District Court and at the conclusion of the evidence the trial court rendered judgment for the defendant. Thereafter the Government appealed and then dismissed its appeal; the plaintiff continued her appeal to conclusion in the Circuit Court.

STATEMENT DISCLOSING BASIS OF JURISDICTION TO REVIEW

A. Statutory Provisions Sustaining Jurisdiction.

The statute under which relief is sought in this Court is Section 240 of the Judicial Code, as amended, 43 Stat. 938, 28 U. S. C., Sec. 347.

The trial court's jurisdiction existed upon the following basis: petitioner, a fullblood enrolled Creek Indian, devisee of Linda Yarhola, an enrolled fullblood Creek Indian, commenced this action by filing a petition in the State District Court of Tulsa County, Oklahoma, seeking to recover from respondent certain restricted funds, proceeds of allotted lands (R. 1-15). Notice of the pendency of the action was served on the Superintendent for the Five Civilized Tribes (R. 45) pursuant to the provisions

of Section 3, Act of April 12, 1926, 44 Stat. 239, and the defendant petitioned for removal to the United States District Court for the Northern District of Oklahoma (R. 46) under Title 28 USCA, Sec. 71, and removal was effected (R. 47), and thereafter the Government intervened. Jurisdiction of the trial court rested upon Section 3 of the Act of April 12, 1926, and Title 28, USCA, Sec. 71. Judgment in the trial court was rendered for defendant and against plaintiff and intervener April 26, 1948. Notice of appeal was filed May 22, 1948 (R. 129).

Jurisdiction of the Circuit Court below rested upon Section 128 of the Judicial Code, as amended, 43 Stat. 936 (23 USCA, 225a).

B. Statutes of the United States, Validity of Which Is Involved.

The statute involved here is: Section 1, Act of April 12, 1926 (44 Stat. 239):

> "That Section 9 of the Act of May 27, 1908 (Thirty-fifth Statutes at Large, Page 312), entitled 'An Act for the removal of restrictions on part of the lands of allottees of the Five Civilized Tribes, and for other purposes,' be, and the same is hereby, amended to read as follows:
>
> " 'Sec. 9. The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, That hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by Section 1 of this Act acquired by inheritance or devise from an allottee of such lands

shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator'."

C. Date of Judgment and Date of Appeal.

The judgment sought to be reviewed here was rendered March 29, 1949 (R. 461). This petition for writ of certiorari was filed ———, 1949.

Since this case raises the question of whether or not the Act of Congress April 12, 1926 (44 Stat. 239), reimposed qualified restrictions on oil and gas royalties from restricted land acquired by devise by a fullblood Creek Indian member of the Five Civilized Tribes to the same extent as upon the land itself and whether or not Section 2 of the Act of May 27, 1908 (35 Stat. 312) authorized the Secretary of the Interior to impose restrictions upon royalties on lands where said restrictions had been terminated by operation of law, and since the Court below has held that the transferring or conveying of the devised interest owned by petitioner, a fullblood Creek Indian, without the approval of the County Court having jurisdiction of the settlement of the estate of the deceased allottee or testator was valid, then this Court should grant certiorari and review this decision.

It is conceded that at the time of the execution of the trust conveyances prior to April 12, 1926, petitioner's devised two-fifths interest in the allotment of Linda Yarhola was not restricted against alienation by any Act of Congress. Subsequently, however, by the Act of April 12, 1926 (44 Stat. 329), Congress imposed restrictions on petitioner's interest in the Linda Yarhola allotment by providing

> "that hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by Section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the County Court having jurisdiction of the settlement of the estate of the deceased allottee or testator * * * ."

This section is but one of a series of statutes by which Congress has afforded the implements for enforcing its historic policy toward Indians to "protect them against the greed of others and their own improvidence" (*Sunderland* v. *United States*, 266 U. S. 226, 233, 45 Sup. Ct. 64, 69 L. Ed. 259). This policy was referred to in *Brader* v. *James*, 246 U. S. 88, 96, 38 Sup. Ct. 285, 62 L. Ed. 88, as discharging "the nation's duty of guardianship over the Indians." Recognition of such policy appears in all of the cases cited hereinafter.

Prior to the 1926 Amendment fullblood heirs, but not devisees, were restricted; the manifest purpose of the amendment "was to place restrictions upon conveyances by full-blood Indian devisees" and thus afford the same protection to fullblood devisees as had been given fullblood heirs prior to the amendment. *Grisso* v. *United States* (C. C. A. 10th, 1943), 138 Fed. (2d) 996, 1000, and in *Stewart* v. *Keyes*, 295 U. S. 403, 79 L. Ed. 1507, Syllabus 3, this Court said:

> "The provisions of the Act of May 27, 1908, chapter 199, § 9, 35 Stat. at L. 312, relating to alienability of lands inherited upon the death of an Indian allottee, are, in view of the general purpose of the act, applicable as well to lands inherited before as after its enactment."

By the ruling of the Circuit Court below, the Act of Congress April 12, 1926, was ineffective to reimpose restrictions against alienation of oil and gas royalties where oil and gas mining leases had been approved by the Secretary of the Interior. The Circuit Court in its opinion has confused the meaning of the provisions of Sections 1 and 2 of the Act of May 27, 1908, *supra*, and Section 9 of said Act as amended by the Act of Congress April 12, 1926. Section 1 of the Act of 1908 applied to conveyances executed by allottees of allotted lands. Section 9, as amended, applied to conveyances of lands by fullblood heirs "acquired by inheritance or devise from an allottee of such lands."

QUESTIONS PRESENTED

First: The qualified restrictions of the Act of April 12, 1926, Section 1, attach upon payment of oil royalties from restricted land to the same extent as upon the land itself, and any conveyance executed by a fullblood heir or devisee is void unless approved by the County Court having jurisdiction of the settlement of the estate of the allottee or testator.

Second: An oil and gas mining lease or conveyance executed by a fullblood restricted allottee member of the Five Civilized Tribes approved by the Secretary of the Interior in conformance with rules and regulations authorized by Section 2 of the Act of Congress May 27, 1908, did not operate to remove the restrictions on the payment of royalties accumulating from said allotment.

Third: The restrictions on the allotment of Linda Yarhola was not imposed by the Secretary of the

Interior. Neither did the Secretary of the Interior remove the restrictions; the restrictions expired by operation of law. The only power having the right to reimpose restrictions was the Congress of the United States. *Taylor* v. *Tayrien* (C. C. A. 10th, 1921), 51 Fed. (2d) 884, 887, *McCurdy* v. *United States*, 246 U. S. 263, 38 Sup. Ct. 289, 62 L. Ed. 706.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

In deciding that the Act of Congress of April 12, 1926, did not have the effect of reimposing restrictions upon oil royalties which had previously been removed by operation of law and further holding that the Secretary of the Interior, under the Act of Congress May 27, 1908, was the only agency having the right to reimpose restrictions, the Court rendered a decision probably in conflict with applicable decisions of this Court in *United States* v. *Noble*, 237 U. S. 74, 80, 35 Sup. Ct. 532, 59 L. Ed. 844, and in *Parker* v. *Richard*, 250 U. S. 235, 238, 30 Sup. Ct. 442, 63 L. Ed. 954, and *Brader* v. *James*, 246 U. S. 88, 62 L. Ed. 591.

Rendered a decision squarely in conflict with the prior decision of the Tenth Circuit Court of Appeals, *Holmes* v. *United States* (C. C. A. 10th, 1931), 53 Fed. (2d) 960, 963, rendered a decision probably in conflict with a decision of the United States Circuit Court of Appeals, Eighth Circuit, *Brown* v. *United States* (C. C. A. 8th, 1928), 27 Fed. (2d) 274, 277; and other decisions of the Tenth Circuit Court of Appeals, *Grisso* v. *United States* (C. C. A. 10th, 1943, 138 Fed. (2d) 996, 1000; *Tiger* v. *Sellers* (C. C. A. 10th, 1944), 145 Fed. (2d) 920, 923; *United States ex rel. Warren*

v. *Ickes* (App. D. C. 1934), 73 Fed. (2d) 844; *United States* v. *Gypsy Oil Co.* (C. C. A. 8th, 1925), 10 Fed. (2d) 487, 492.

The decision of the court below is a reversal of the former decisions and construction by the court of Acts of Congress enacted for the protection of the members of the Five Civilized Tribes, and is an attempt to distinguish or apply the Acts of Congress to mineral interest separate from the land. It is a further attempt to vest in the Secretary of the Interior a power never authorized or anticipated by Congress and to create a new policy with reference to officials or agencies designated by Congress to impose and remove restrictions on allotted and inherited lands.

Accompanying this petition is a certified transcript of the record in this case including the proceeding in the United States Circuit Court of Appeals for the Tenth Circuit.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of this Honorable Court directed to the United States Circuit Court of Appeals for the Tenth Circuit commanding the Court to certify and send to this Court for its review and determination on a day certain, a transcript of the records and proceedings herein; and that the judgment of the court below be reversed by this Court; and that your petitioner have such further relief as to this Court may seem just.

CREEKMORE WALLACE,
B. E. HARKEY,
810 Braniff Building,
Oklahoma City, Oklahoma,

Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

Nancy Bradburn, *nee* Yarhola, is an enrolled full-blood Creek Indian, daughter of Cussehta and Linda Yarhola, both also fullblood Creek Indians. Linda was allotted certain lands in Creek County, Oklahoma, upon which an oil and gas lease was taken February 12, 1912, and approved by the Secretary of the Interior. By various assignments all approved by the Secretary of the Interior, the lease was acquired by Shell Oil Company, Incorporated, respondent.

Linda Yarhola died testate February 5, 1917, and among other provisions in her Will, devised her allotted land one-fifth to her husband, Cussehta, and two-fifths each to Nancy and another daughter, Lessey.

The Will of Linda Yarhola was admitted to probate by the County Court of Okmulgee County, Oklahoma, and in due time an order of distribution was made distributing and vesting title in two-fifths interest of the 160-acre allotment of which Linda Yarhola died seized in petitioner.

Petitioner was a resident of Okfuskee County, Oklahoma, and during her minority and for some time after she reached her majority, she was represented by a guardian legally appointed by the probate court of Okfuskee County, Oklahoma; in June, 1924, the County Court of Okfuskee County, Oklahoma, entered an order restoring her to competency and discharging her guardian. June 14, 1924, she conveyed all of her property in trust to Washing-

ton Grayson and Hill Moore, trustees, for a period of seven years. The trustees had broad powers to invest, re-invest, collect, manage, sell, and otherwise deal with the estate and its proceeds, paying Nancy a stated $500.00 per month. At the end of the term they were to reconvey said estate to Nancy. The trust agreement was modified at various times and in September, 1925, the term of the trust was extended to twenty-one years.

On December 19, 1929, one of the trustees resigned and Nancy, joined by the remaining trustee, conveyed all of said estate to the new trustees.

In December, 1937, the trustees terminated the trust by quitclaiming back to Nancy, whereupon she conveyed the estate in trust to Roy Bradburn for a period of ten years, said conveyance being dated December 17, 1937.

The two-fifths devised interest of the Linda Yarhola allotment belonging to petitioner constituted part of the property conveyed in each of the foregoing trust deeds, none of which were approved by any county court.

Subsequent to the settlement of the estate of Linda Yarhola, the Superintendent for the Five Civilized Tribes on April 2, 1921, advised the respondent that, owing to a recent United States Supreme Court decision, the Department was relinquishing supervision over the Linda Yarhola allotment. The respondent thereafter paid for Nancy's two-fifths of the one-eighth royalty of such oil runs by remittance directly to her various trustees, changes in such trustees being reflected in various transfer orders executed by petitioner as the various trusts were made.

Between the years 1924 and 1939 large sums in royalties were paid Nancy's various trustees for her devised two-fifths interest in the Linda Yarhola allotment. Plaintiff below sought to recover from respondent for these royalties paid the trustees subsequent to December 19, 1929, on the theory that the Act of April 12, 1926, reimposed restrictions on said devised two-fifths interest and that the conveyances, division orders and transfer orders executed by petitioner subsequent to December 19, 1929, were void in the absence of County Court approval; that the royalty payments to such trustees under such circumstances were wholly ineffectual.

The trial court rendered judgment for respondent, Shell Oil Company, Incorporated, upon three grounds; the only matter considered by the Circuit Court of Appeals and pertinent to this application for certiorari is found in the second finding of the trial court, wherein it was held that the Act of Congress of April 12, 1926, did not restrict royalty payments to the trustees on this lease or restrict petitioner's right to designate, by assignments or conveyances, other persons to receive such royalties.

Upon these facts the Court below held that:

> "The 1926 Act did not have the effect of reimposing restrictions upon the receipt of oil royalties which had heretofore been restricted only by regulations of the Secretary of the Interior under the 1908 Act. We said that the 1926 Act 'in no sense impinged on the right to receive payment of royalties under oil and gas leases', the restrictions upon which had been removed by the Secretary of the Interior and not reimposed by him before the effective date of the 1926 Act."

The opinion of the Circuit Court of Appeals appears at pages 461 to 466 of the transcript.

ARGUMENT AND AUTHORITIES

The Question to Be Considered Is the Construction of the Act of Congress, April 12, 1926 (44 Stat. 239)

Because of the strained construction placed upon the various Acts of Congress by the Circuit Court of Appeals, we think it would materially aid the Court to briefly refer to the various Acts of Congress relating to the Five Civilized Tribes as regards restrictions on alienation or encumbrance:

The Act of March 1, 1901 (31 Stat. 861, 863), provided that lands allotted to citizens of the Five Civilized Tribes could not be sold or encumbered "before the expiration of five years from the date of the ratification of this agreement, except with the approval of the Secretary of the Interior."

This Act of Congress was superseded by Section 16 of the Supplemental Creek Agreement (Act of June 30, 1902, 32 Stat. 500, 503) which provided:

> "Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. * * * Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely

void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

Under Section 17 of the same agreement, allottees were given a limited right to make short-term leases for non-mineral purposes, but leases for longer terms and leases for mineral purposes might be made only with the approval of the Secretary of the Interior (32 Stat. 504).

By Act of April 21, 1904 (33 Stat. 189, 204), it was provided:

> "And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, * * *."

Before the expiration of the five years specified in the above-quoted provisions of the Creek Agreements, Congress passed the Act of April 26, 1906 (34 Stat. 137). Section 19 of that Act provided (34 Stat. 144):

> "That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or incumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress."

Section 22 of the Act of April 26, 1906, *supra*, provided that:

> "All the conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior under such rules and regulations as he may prescribe."

Section 23 of the Act of April 26, 1906, *supra*, provided:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein; Provided, that no will of a full blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner."

Next came the Act of May 27, 1908 (35 Stat. 312), which provided that all lands belonging to intermarried whites, freedmen, and Indians of less than half blood were free from restrictions, and further provided that the homestead of Indian allottees of half blood or more were restricted until April 26, 1931, with the further proviso that the Secretary of the Interior would have the right to remove the restrictions in whole or in part "under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

In Section 2 of said Act it was provided:

> "that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for

more than one year and leases of restricted lands for periods of more than five years, may be made with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: * * *.

"Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.*"

It will thus be seen that under the proviso of Section 9 that a conveyance of any interest of any fullblood Indian heir was void unless the same was approved by the County Court having jurisdiction of the settlement of the estate of the allottee or testator. Nowhere will there be found any Act of Congress between the dates of 1902 and 1933 vesting power in the Secretary of the Interior to reimpose restrictions on land or royalties belonging to members of the Five Civilized Tribes.

The Act of Congress May 27, 1908 (35 Stat. 312), was first construed by the Supreme Court of the United States in the case of *Parker* v. *Richard*, 250 U. S. 235, 238, 30 Sup. Ct. 442, 63 L. Ed. 954. There the Court held:

"By the Act of 1908, which imposed the restrictions on alienation and contained the leasing provision, Congress further declared, in § 9, 'that the death of any allottee * * * shall operate to remove all restrictions upon the alienation of [the] allottee's land: Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved

> by the court having jurisdiction of the settlement of the estate of said deceased allottee.' In the absence of the proviso it would be very plain that, on the death of the allottee, all restrictions on the alienation of the land allotted to him were removed. But the proviso is there and cannot be disregarded. It obviously limits and restrains what precedes it. In exact words it puts full-blood Indian heirs in a distinct and excepted class and forbids any conveyance of any interest of such an heir in such land unless it be approved by the court named. In other words, as to that class of heirs the restrictions are not removed but merely relaxed or qualified to the extent of sanctioning such conveyances as receive the court's approval. Conveyances without its approval fall within the ban of the restrictions. * * *"

Further in the opinion the Court held:

> "Under the Act of 1908, as already shown, leases of 'restricted lands' for oil and gas mining may be made with the approval of the Secretary of the Interior, under regulations prescribed by him, 'and not otherwise.' The present lease was made and approved under that provision. The land was then restricted and the restrictions have not since been removed. * * *"

This opinion has not been changed, reversed, or modified in any respect until the opinion of the Circuit Court of Appeals in *Chisholm* v. *House*, 160 Fed. (2d) 632.

In *Chisholm* v. *House*, it was held [160 Fed. (2d) 647], that the 1926 Act did not reimpose restrictions previously promulgated by the Secretary's regulations and by him previously removed, and that the Act "dealt solely with restrictions against alienation. It in no sense impinged

on the right to receive payment of royalties under oil and gas leases. The restrictions with respect to the payment of such royalties, under the regulations promulgated by the Secretary of the Interior, had been removed by him, and could only be reimposed by action taken by him."

It is plain that by this holding the Circuit Court of Appeals has said that lands once freed from restrictions could be restricted only by action of the Secretary of the Interior. This is the first time in history that any court in interpreting the Acts of Congress relating to members of the Five Civilized Tribes, has held that the Secretary of the Interior could reimpose restrictions on land once freed from the same.

Congress Is the Only Authority Having Power to Reimpose Restrictions On Property Once Freed Therefrom.

The courts have repeatedly held that there is no limitation upon the authority of Congress to restrict Indian lands. Congressional authority here is plenary, *Taylor* v. *Tayrien* (C. C. A. 10th, 1921) 51 Fed. (2d) 884, 887; *Holmes* v. *U. S.* (C. C. A. 10th, 1931), 53 Fed. (2d) 960, Syllabus 1:

> "Congress has plenary power in matter of continuance, removal, or qualification of restrictions on Indian lands after death of allottee."

Hickey v. *U. S.* (C. C. A. 10th, 1933), 64 Fed. (2d) 628, Syllabus 1:

> "Congress has right to reimpose restrictions on Indian property once freed therefrom [Act June 28, 1906, § 4 (34 Stat. 544); Act March 3, 1921, § 4 (41 Stat. 1250); Act Feb. 27, 1925, § 1 (25 USCA § 331 note)]."

Also, *Brader* v. *James*, 246 U. S. 88, 62 L. Ed. 591, and *McCurdy* v. *U. S.*, 246 U. S. 263, 62 L. Ed. 706.

In the case of *Brader* v. *James, supra*, in the body of the opinion the Court stated:

> "While the tribal relationship existed, the National guardianship continued, and included authority to make limitations upon the rights which such Indians might exercise in respect to such lands as are here involved. This authority would not terminate with the expiration of the limitation upon the rights to dispose of allotted lands; the right and duty of Congress to safeguard the rights of Indians still continued."

And in the case of *McCurdy* v. *U. S., supra*, the Court held:

> "While an Indian is still a ward of the Nation, there is power in Congress even to reimpose restrictions on property already freed; *Brader* v. *James*, decided this day (246 U. S. 88 ante 59) 38 Sup. Ct. Rep. 285;"

The Qualified Restrictions of the Act of April 12, 1926, Sec. 1, Attach Upon Payment of Oil Royalties From Restricted Land to the Same Extent As Upon the Land Itself.

Section 1 of the Act of April 12, 1926, amended Section 9 of the Act of May 27, 1908, and provides:

> "The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land; Provided, That hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by Section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid

unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator * * *."

While there are thus two Federal agencies for exercising the power of removal of restrictions, the fields of authority of these respective agencies are entirely separate, distinct and mutually exclusive; that is, where Congress has designated the Secretary of the Interior as the agency for removing restrictions, approval by the county court of an alienation is wholly ineffectual, *Holmes* v. *United States* (C. C. A. 10th, 1931), 53 Fed. (2d) 960, 963; and where the Congressional authority for removing restrictions is a county court, and such court has approved an alienation, not only is approval by the Secretary unnecessary, *United States* v. *Gypsy Oil Co.* (C. C. A. 8th, 1925), 10 Fed. (2d) 487, 492, but the Secretary may not prevent such alienation by his disapproval, *United States ex rel. Warren* v. *Ickes* (App. D. C., 1934), 73 Fed. (2d) 844, 848.

Other instances are numerous where the qualified restrictions imposed by the Act of April 12, 1926, have been held removable only by a county court, in respect to conveyance by a fullblood heir and by a fullblood devisee.

Not only is the protective power of Congress sufficient, but it is plain that Congress provided such protection for royalty payments after the 1926 Act. The words of the Act extend its protective scope to "any interest in lands." The wording must necessarily include any alienation of an interest less than the fee, including the daily severance from the land of oil and gas. In *Tiger* v. *Sellers* (C. C. A. 10th, 1944), 145 Fed. (2d) 920, 922, the interest

held subject to qualified restrictions was an assignment of future rents which was said to be an incorporeal hereditament. Oil royalty is likewise an incorporeal hereditament, *Burns* v. *Bastien*, 174 Okla. 40, 50 Pac. (2d) 377; *Dabney Johnston Oil Corp.* v. *Walden*, 4 Cal. (2d) 637, 52 Pac. (2d) 237.

In *United States ex rel. Warren* v. *Ickes* (App. D. C., 1934), 73 Fed. (2d) 844, there were fullblood heirs, but one of them had a special estate under the second proviso of Section 9 of the Act of May 27, 1908, because he was born after March 4, 1906, and therefore the Secretary retained supervision over the royalty income. When the special estate terminated by reason of death of that heir, the Court held that royalty funds in the Secretary's hands were no longer subject to the Secretary's control, and could be alienated by the other fullblood heirs, but that such alienation required county court approval because the qualified restrictions attached. The Court said [73 Fed. (2d) 847] that "The royalties are to be treated as composing part of the restricted homestead estate * * * " and held that the status of the royalty funds was the same as the land in respect of restrictions, termination of Secretarial control and the attaching of qualified restrictions.

In *United States* v. *Noble*, 237 U. S. 74, 80, 35 Sup. Ct. 532, 59 L. Ed. 844, the Court declared:

> "The rents and royalties were profit issuing out of the land. When they accrued, they became personal property; but rents and royalties to accrue were a part of the estate remaining in the lessor,"

and held that congressional authorization given a restricted Indian to lease his land did not permit him to assign future royalties.

The Conveyance of December 19, 1929.

If an assignment of future royalties is forbidden, then clearly the trust instrument of December 19, 1929 (R. 39), is such a conveyance as to require county court approval. The instrument purports to be a mere substitution of a co-trustee, and the trial court so considered it (R. 128, Conclusion 5), but this is a wholly superficial view, formed merely from the appearances of things rather than from any regard for realities. In this instrument Nancy purported to authorize the resigning trustee, Hill Moore, to convey all of the trust corpus to his successor, D. W. Johnston, and Moore executed such a deed (R. 289). The oil company demanded and received a transfer order (R. 248) reflecting such change of title, just as it would on any other change of title. In *First National Bank* v. *Ickes* (App. D. C., 1945), 154 Fed. (2d) 851, 853, the Court in a comparable situation said:

> "It contends that since the devise was to a non-Indian trustee, the Act does not apply. We think that the District Court was correct in its ruling upon that contention. In the first place, the Act restricts the alienation of 'any interest' in lands by full-blood Indians of the Five Civilized Tribes. Clearly, the beneficiaries had interests, and they were property interests. *Merchants' Loan & Trust Co.* v. *Patterson* (1923), 308 Ill. 519, 139 N. E. 912; *Illinois Nat. Bank of Springfield* v. *Gwinn* (1945), 390 Ill. 345, 61 N. E. (2d) 249, 159 A. L. R. 468; *Jones* v. *Jones* (1942), 344 Pa. 310, 25 Atl. (2d) 327, and cases there cited: Restatement,

> Trusts, Sec. 130. In the second place, the statute was enacted by Congress for the protection of the Indians, and its terms are broad and non-technical. It would require clear language to compel us to hold that its provisions can be evaded by the simple expedient of interposing a non-Indian trustee to hold the legal title."

If the 1926 Act, *supra*, is construed to restrict alienation by the Indian heir or devisee, but not his "right to receive oil royalties" then the whole public policy is thwarted and congressional intent nullified. The Indian's sand-bur patches and red clay gullies are safeguarded to him; the underlying oil and gas become free to the first taker.

It is impossible that Congress intended any such result by the 1926 Act. When Congress there said that county court approval was required of the conveyance of "any interest in land," Congress plainly meant to include the day-by-day severance of oil and gas.

In *United States* v. *Thurston County*, 144 Fed. 287, it was held that the proceeds of restricted land were subject to the same restrictions as the land, and in *National Bank of Commerce* v. *Anderson*, 147 Fed. 87, it was held that the restrictions applied to the proceeds of timber cut from restricted land as well as to the land itself.

It was next held that land purchased with the proceeds of sale of restricted land was likewise subject to restriction, *Sunderland* v. *United States*, 266 U. S. 226, citing with approval *United States* v. *Law*, 250 Fed. 218, and *United States* v. *Thurston County* and *National Bank of Commerce* v. *Anderson*, *supra*.

That was soon followed by holding that land purchased with accumulated royalties of an oil and gas lease of restricted land was subject to restriction where the purchase had been permitted on condition that the deed contain a clause restricting alienation without the approval of the Secretary [*United States* v. *Brown*, 8 Fed. (2d) 564]. In that case, the Court (8 C. C. A.) expressly rejected the contention that there was a difference between land and royalties and held that both were impressed with the same trust (page 567).

In *Carpenter* v. *Shaw*, 280 U. S. 363, a tax on royalty interest was held to be prohibited by a provision which exempted allotted lands.

In *United States* v. *Moore*, 284 Fed. 86, an assignment of royalties was held void as in violation of restriction against alienation of the land, and a recovery of accrued royalties was sustained. In that case the Court said:

> "[The Government's] interest is not pecuniary, but governmental. *Heckman* v. *U. S.*, 224 U. S. 413, 32 S. Ct. 424, 56 L. Ed. 820. So it is with respect to this allotment. On principle, the action is not essentially different from one brought to recover the land itself. The authority to sue necessarily arose from the law, on the ground that the royalties were illegally obtained and there was no other remedy available. It is sustained on like reason as in the case of *United States* v. *Gray*, 201 Fed. 291, 119 C. C. A. 529, decided by this court where the action was for the recovery of damages for breach of a lease made by the allottee."

In *United States ex rel. Warren* v. *Ickes*, 73 Fed. (2d) 844, the Court held that the qualified restrictions of the

1926 Act attach, not only upon the land, but upon royalty payments as well, and that the general restrictions arising out of regulations promulgated by the Secretary, had lapsed completely. The Court there said:

> "The royalties are to be treated as composing a part of the restricted homestead estate; hence the removal of the restrictions from the homestead carries with it the full release of the funds accrued from oil and gas royalties. In the case of *Parker* v. *Riley*, 250 U. S. 66, 70, 39 S. Ct. 405, 406, 63 L. Ed. 847, the court, considering a lease and the rights acquired under it where the special estate of a minor was involved, as in the instant case, said: 'The oil and gas lease was to run for 10 years and as much longer as oil or gas was found in paying quantity. * * * The oil and gas were to be extracted and taken by the lessee, and for this royalties in money were to be paid. These minerals were part of the homestead, and the lease was to operate as a sale of them as and when they were extracted. In that sense the heirs were exchanging a part of the homestead for the money paid as royalties, but no heir was surrendering any right to the others. Thus the rights of all in the royalties were the same as in the homestead. Nothing in the Act of May 27, 1908, makes to the contrary.'
>
> "With the removal of the restrictions, the land, together with the accumulated oil and gas royalties in the hands of the Secretary, became part of the unrestricted estate, and supervision over those funds ceased. On removal of the restrictions the owner of the land and the funds was at full liberty to use, dispose of, and contract with relation to them in his or her individual capacity, without reference to approval or disapproval of the Secretary of the Interior, subject only to the approval of the court of competent juris-

diction, in this instance the county court of Hughes County, Okla."

Quoting from *Chisholm* v. *House, supra,* the court below stated that the right to receive future royalties had been effectively conveyed by the Indian devisee prior to the adoption of the 1926 Act. In this view the court wholly ignores the effect of the subsequent instruments executed by petitioner after the adoption of the 1926 Act. On December 19, 1929, the defendant, by virtue of the terms of the lease and transfer orders and division orders which had been previously executed, was under obligation to pay said royalties to Washington Grayson and Hill Moore, the then trustees. On December 19, 1929, plaintiff had a property interest in this land and the provisions of the Act of Congress April 12, 1926, *supra,* extended to that property interest. In *First National Bank* v. *Ickes,* 154 Fed. (2d) 851, 853, the Court said:

> "It contends that since the devise was to a non-Indian trustee, the Act does not apply. We think that the District Court was correct in its ruling upon that contention. In the first place, the Act restricts the alienation of 'any interest' in lands by full-blood Indians of the Five Civilized Tribes. Clearly, the beneficiaries had interests, and they were property interests. *Merchants' Loan & Trust Co.* v. *Patterson* (1923), 308 Ill. 519, 139 N. E. 912; *Illinois Nat. Bank of Springfield* v. *Gwinn* (1945), 390 Ill. 345, 61 N. E. (2d) 249, 159 A. L. R. 468; *Jones* v. *Jones* (1942), 344 Pa. 310, 25 Atl. (2d) 327, * * *"

On December 19, 1929, plaintiff executed an instrument terminating the liability and rights of Hill Moore as a trustee (Exhs. 16 and 17, R. 289) and purported to convey to Washington Grayson and D. W. Johnston, trus-

tees, her interest in said property including the two-fifths devised interest in the Linda Yarhola allotment, with the right vested in said trustees to receive payment of future royalties. This instrument was a grant by the plaintiff of an interest in property. But it was not approved by the County Court of Okmulgee County, the Court having jurisdiction of the settlement of the estate of the allotee.

That future royalties constitute an interest in the land and come within the scope of the statute restricting against alienation has been definitely settled by the Supreme Court in *United States* v. *Noble, supra,* and *United States* v. *Moore,* 284 Fed. (2d) 86, and *Tiger* v. *Sellers,* 145 Fed. (2d) 920.

The Conveyance of December 17, 1937

On December 15, 1937, the then trustees, D. W. Johnston and Washington Grayson, quit-claimed said property back to Nancy Bradburn (Exh. 29, R. 309) and on December 17, 1937, Nancy executed a deed or conveyance vesting title in said two-fifths devised interest in Roy Bradburn (Exh. 23, R. 295). Defendant examined the title, concluded that the instrument of conveyance had effectively vested title in Roy Bradburn to said property and prepared and forwarded to all of said parties transfer orders and division orders to be executed by said parties designating the transfer and the interest acquired by Roy Bradburn (Exh. 26, R. 303 and Exh. 27, R. 306). None of said instruments or conveyances were approved by the County Court of Oklahoma having jurisdiction of the settlement of the estate of Linda Yarhola, the allottee.

Like the instrument of December 19, 1929, the conveyance of December 17, 1937, was accepted by the defendant as a conveyance of plaintiff's interest in the lands as well as the oil and gas royalties. However, defendant did not pay to the grantee named in the conveyance of December 17, 1937, until such time as plaintiff had executed transfer orders and division order setting up the respective interest of the parties in the mineral grant.

Unquestionably these instruments were conveyances of "an interest in lands" and said instruments not having been approved by the County Court in Oklahoma having jurisdiction of the administration and settlement of the estate of the deceased allottee the same were void.

In the case of *United States* v. *Noble, supra,* this Court was considering the legal effect of an instrument executed by a restricted Quapaw Indian wherein the allottee had the right to execute a valid oil and gas mineral lease on his property without the approval of the Secretary of the Interior, but could not transfer or convey his land without the approval of the Secretary of the Interior or first having obtained a removal of restrictions.

In an action to recover the rents and royalties transferred by the allottee without the approval of the Secretary of the Interior this Court said:

> "It necessarily follows that the allottee in the present case, having no power to convey his estate in the land, could not pass title to that part of it which consisted of the rents and royalties."

And in the case of *United States* v. *Moore, supra:*

> "(3) It is insisted that the payments made to the defendant were accrued royalties, and hence of per-

sonal property of the allottee, and within her control. That this contention is unavailing was made clear in the *Noble* case. The claim to the royalties was wholly derived from the illegal assignment, and was dependent upon it, and therefore the subsequent appropriation of the funds could not be justified. Furthermore, the wisdom of the restriction is well illustrated by the improvidence of the allottee in contracting upon an inadequate consideration for the transfer of the royalties. In our view, a recovery in this case cannot be defeated by the fact that the payments were made to the defendant after the royalties accrued."

What the petitioner is asking for in this case is the recovery of the royalties paid to the so-called trustees under an illegal assignment or a void transfer.

The various instruments of conveyances executed by plaintiff, a fullblood Creek Indian, member of the Five Civilized Tribes, transferring her two-fifths devised interest in the allotment of Linda Yarhola, a fullblood Creek allottee, subsequent to April 12, 1926, not having been approved by the County Court having jurisdiction of the settlement of the estate of the deceased allottee, was ineffectual to vest in the grantee the right to collect the rents and royalties from said restricted allotment. The defendant is charged with notice of the passage of the Acts of Congress relating to petitioner and the members of her tribe, *Heckman* v. *United States,* 32 Sup. Ct. 424, 224 U. S. 413, 56 L. Ed. 820; therefore, defendant had legal knowledge of the fact that said rents and royalties were restricted.

The decision below is plainly contrary to:

(a) The will of Congress expressed in the Act of May 27, 1908 (35 Stat. 312); as amended by Section 1 of the Act of Congress, April 12, 1926 (44 Stat. 239).

(b) Decisions of this Court in *United States* v. *Noble*, 237 U. S. 74, 80, 35 Sup. Ct. 532, 59 L. Ed. 844; *Parker* v. *Richard*, 250 U. S. 235, 238, 30 Sup. Ct. 442, 63 L. Ed. 954; *Brader* v. *James*, 246 U. S. 88, 38 Sup. Ct. 285, 62 L. Ed. 591; and *Stewart* v. *Keyes*, 295 U. S. 403, 55 Sup. Ct. 807, 79 L. Ed. 1507.

(c) Decisions of the Tenth Circuit Court of Appeals in *Holmes* v. *United States* (C. C. A. 10th, 1931), 53 Fed. (2d) 960, 963; *Grisso* v. *United States* (C. C. A. 10th, 1943), 138 Fed. (2d) 996, 1000; and *Tiger* v. *Sellers* (C. C. A. 10th, 1944), 145 Fed. (2d) 920, 923.

(d) Decisions of the Eighth Circuit Court of Appeals in *Brown* v. *United States* (C. C. A. 8th, 1928), 27 Fed. (2d) 274, 277; *United States* v. *Gypsy Oil Co.* (C. C. A. 8th, 1925), 10 Fed. (2d) 487, 492; and *United States* v. *Moore* (C. C. A. 8th, 1922), 284 Fed. 86.

(e) Decisions of the Appellate Court for the District of Columbia in *United States ex rel. Warren* v. *Ickes* (App. D. C. 1934), 73 Fed. (2d) 844; and *First National Bank* v. *Ickes* (App. D. C. 1945), 154 Fed. (2d) 851.

The decision below should, therefore, be reviewed here and reversed. All of which is respectfully submitted.

CREEKMORE WALLACE,
B. E. HARKEY,
810 Braniff Building,
Oklahoma City 2, Oklahoma,

Counsel for Petitioner.

June, 1949.

No. 116

In the Supreme Court of the United States

October Term, 1949.

NANCY BRADBURN, *NEE* YARHOLA, *Petitioner,*

vs.

SHELL OIL COMPANY, INCORPORATED, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI.*

GEO. W. CUNNINGHAM,
Box 1191,
Tulsa 2, Oklahoma,
Attorney for Respondent.

Of Counsel:
JESSE M. DAVIS,
Box 1191,
Tulsa 2, Oklahoma.

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TABLE OF CASES.

STATUTES.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI.*

May It Please the Court:

Supplemental Statement of the Case.

For convenience we shall refer to the petitioner, Nancy Bradburn, as "Nancy"; her father, Cussehta Yarhola, as "Cussehta"; her mother, Linda Yarhola, as "Linda"; and the respondent, Shell Oil Company, Incorporated, as "Shell." *All emphasis supplied by us.*

The Linda Yarhola oil and gas lease covering the Northwest Quarter of Section 9 was a departmental lease dated February 12, 1912 (R. 269). It was properly approved by the Secretary of the Interior (R. 275). This lease provided for payment "as royalty, the sum of *12½ per cent of the gross proceeds* of all crude oil extracted from the said land," (R. 270) etc. Pursuant to the provisions of such lease, all payments thereunder were made to the Su-

perintendent at Muskogee, Oklahoma, *until restrictions were removed* by the Secretary of the Interior on April 2, 1921 (R. 328). Thereafter payments were made directly to the owners or their nominees. Upon the death of Linda, Nancy's mother, on February 5, 1917, a 1/5 interest in this land was devised to her husband, Cussehta, and 2/5 each to Linda's daughters, Nancy and Lessey (R. 80). On June 14, 1924, while this land was unrestricted, Nancy conveyed it by a trust deed to Washington Grayson and Hill Moore, her trustees, for a period of seven years (R. 91). On April 14, 1925, while the land was still unrestricted, she extended the term to 21 years (R. 33). Upon the death of Cussehta on November 15, 1936, his 1/5 interest in these royalties was inherited by Nancy and Lessey in equal shares. *Thereafter Nancy owned 1/2 of such royalties subject to the trust deeds.* The royalty payments by Shell on the 1/2 interest in these royalties acquired by Nancy were made as follows:

From June 14, 1924, to December 30, 1929, 2/5 of the royalties were paid to Washington Grayson and Hill Moore, trustees for Nancy Sievers (now Bradburn) (R. 327). *The validity of these payments is not being attacked.*

From December 30, 1929, to November 1, 1937, 2/5 of said royalties were paid to Washington Grayson and D. W. Johnston, trustees for Nancy Sievers (now Bradburn) (R. 327).

From May 1, 1924, to December 1, 1929, 1/10 of said royalties were paid to Washington Grayson and Hill Moore, trustees of Cussehta Yarhola (R. 328). *The validity of these payments was upheld in Chisholm* v. *House, et al.,* (C. A. 10) 160 F. (2d) 632.

From December 1, 1929, to November 1, 1937, this 1/10 interest was paid to Washington Grayson and D. W. Johns-

ton, trustees of Cussehta Yarhola (R. 328). *The validity of these payments was likewise upheld in the Chisholm case.*

From November 1, 1937, to October 1, 1939, 2/5 of the royalties were paid to Roy Bradburn, trustee for Nancy Bradburn, and 1/10 to Nancy Bradburn personally (R. 328). *The payments to Nancy personally are not under attack.*

On November 2, 1942, Nancy filed a petition in intervention in *Chisholm, et al.,* v. *House, et al.,* case No. 443-Civil, in the United States District Court for the Eastern District of Oklahoma, and at her request Shell was made a party defendant to that action (R. 332-345). In the *Chisholm* case Nancy sought to recover from Shell for royalties allegedly due and owing Cussehta at the time of his death, under the Linda Yarhola lease; and *for royalties allegedly owing to Nancy personally from November 13, 1936, to November 29, 1937,* on the 1/10 interest she inherited from Cussehta (R. 392). The judgment against Nancy and in favor of Shell (R. 410) was affirmed by the United States Court of Appeals, Tenth Circuit, in so far as it related to Shell (*Chisholm* v. *House, et al.,* 160 F. (2d) 632). That judgment is now final as to Shell (R. 235).

The present action was brought by Nancy against Shell on December 28, 1942 (R. 1, 44), for the recovery of 2/5 of the royalties due under the *identical* Linda oil and gas lease from June 14, 1924, to December 17, 1937, and 1/2 the royalties payable under the terms of said lease from November 17, 1937, to August 1, 1941. The trial court held that the present cause of action was inseparable from that prosecuted by Nancy in the *Chisholm* case, could have been there litigated, and that *the judgment in that case is res judicata of the case at bar* (R. 126-127).

On December 15, 1937, by mutual agreement between Nancy and her trustees, the Hill Moore and D. W. Johnston trust was terminated (R. 122, Finding of Fact 15). These trustees made an itemized report of income and disbursements while they were trustees (R. 436-459). The Nancy Sievers referred to in this report is the same as Nancy Bradburn (R. 435). This report shows that in addition to payments made to others in behalf of Nancy, these trustees, between December 30, 1929, and December 15, 1937, the date of the termination of the trust agreement, paid Nancy personally $37,807.51. During that same period of time Shell paid Nancy's trustees only $18,393.36 (R. 327). The trust estate was turned over to Nancy and on December 15, 1937, she and her husband, Roy Bradburn, executed a release and discharge of the trustees and the sureties upon their bond wherein they acknowledged full accord and satisfaction of the trust estate (R. 435).

On December 17, 1937, Nancy executed a trust instrument to Roy Bradburn wherein she was the sole beneficiary (R. 295, 43). The powers of Roy Bradburn as trustee were limited to the management and control of the estate *without any power of sale* (R. 123, Finding of Fact 20). On February 2, 1938, Nancy executed a transfer order (R. 306) authorizing Shell to pay Roy Bradburn, as her trustee, any and all royalties which accrued subsequent to November 1, 1937, and which might thereafter accrue to the credit of a 2/5 interest in said royalties (R. 123, Finding of Fact 21). Thereafter Shell properly paid all royalties accruing to this 2/5 interest to Roy Bradburn as trustee for Nancy and all royalties accruing to the remaining 1/10 interest to Nancy personally (R. 123, Finding of Fact 22).

On August 9, 1939, Shell sold this oil and gas lease to

Sinclair Prairie Oil Company and has not run any oil and does not owe any money for oil run from said properties since that date (R. 241). Thereafter, on November 25, 1942, Sinclair Prairie Oil Company was advised by letter from the Superintendent of the Five Civilized Tribes that supervision of this lease, which had been relinquished on April 2, 1921, was being reassumed and it was requested that future royalty payments be made to the Superintendent (R. 313). *This was three years after Shell sold this lease and only three days before this present action was filed on December 28, 1942* (R. 1, 44).

Summary of Answer to Questions Presented by Petitioner.

On page 9 of her application for a writ Nancy lists under "Questions Presented" three points, *none of which justify the granting of a writ of certiorari.*

POINT ONE. Her first point is of a dual character. To the first half we submit (*a*) that the Act of April 12, 1926, Section 1, does not restrict payment of oil royalties due under pre-existing oil and gas leases in the absence of a regulation by the Secretary of the Interior to that effect, *Parker* v. *Richard,* 250 U. S. 235, 63 L. ed. 954, 6; and (*b*) this identical question was decided contrary to Nancy's contention in a case brought by Nancy against Shell to collect royalties payable under this same oil and gas lease. *Chisholm* v. *House,* 160 F. (2d) 632. The judgment in the *Chisholm* case has become final and Nancy is now estopped from relitigating this same issue. *Tait, Collector of Internal Revenue,* v. *Western Maryland Railway Co.,* 289 U. S. 620, 77 L. ed. 1405.

In so far as the second half of the first point is concerned, the Court of Appeals stated and we concede that

under the 1926 Act *a conveyance* executed by a full-blood devisee is void unless approved by the proper County Court, but the Court of Appeals held in both this and in the *Chisholm* case that *payment of oil royalties due under a pre-existing oil and gas lease directly to the restricted Indian or his nominee did not constitute a conveyance* within the purview of the 1926 Act.

POINT TWO. We have no quarrel with Nancy's statement under Point Two that an oil and gas mining lease executed by a full-blood restricted allottee, with the approval of the Secretary of the Interior, did not operate to remove the restrictions upon the payment of royalties *which the Secretary's rules and regulations required to be paid to him.* However, it is the lease and the Secretary's regulations, and not the Act of May 27, 1908, that restrict the payment of such royalties. As a matter of fact, it was the 1912 oil and gas lease, issued pursuant to the rules and regulations of the Secretary, that created such restrictions in this case. *Parker* v. *Richard,* 250 U. S. 235, 63 L. ed. 954, 6. It was not until nine years later, on April 2, 1921, that the Secretary relinquished supervision over Linda's land (R. 328).

POINT THREE. We concede that the restrictions upon the allotment of Linda Yarhola were not imposed by the Secretary of the Interior. *However, restrictions on the manner in which royalties were to be paid were imposed by the terms of the oil and gas lease and the regulations of the Secretary. Parker* v. *Richard,* 250 U. S. 235, 63 L. ed 954, 6 (1 c.). We concede that the only power having the right to reimpose restrictions was the Congress of the United States, either directly *or by granting such power to the Secretary of the Interior to be exercised in those cases where he deemed it necessary.* The Act of April 12,

1926, did not reimpose any restrictions on the manner in which royalties should be paid. As under the 1908 Act, *the manner in which royalties were to be paid was left entirely to the discretion of the Secretary of the Interior.* The Secretary did not deem it necessary to reimpose restrictions upon the payment of royalties due Nancy until November 25, 1942 (R. 313). This was three years after Shell had sold its lease (R. 241)

Summary of Respondent's Argument.

Petitioner's application for writ of *certiorari* should be denied because:

POINT A. The Court of Appeals correctly held that in the absence of a regulation by the Secretary of the Interior to the contrary, money payable as royalty under an oil and gas lease on restricted lands is payable directly to the owner of such royalty or to his nominee. The question is not and the Court of Appeals did not hold that Nancy could, without County Court approval, sell her restricted lands or any interest therein. It merely held that moneys payable as royalty under a valid oil and gas lease could, in the absence of a regulation by the Secretary of the Interior to the contrary, be paid to Nancy or to some agent designated by her. By no stretch of the imagination can the Court of Appeals opinion be held to hold that after the passage of the 1926 Act, Nancy could sell her future royalties without approval of the County Court. The "Reasons Relied on for Allowance of the Writ" appear at page 10 of Nancy's Petition for a Writ of Certiorari. Only one ground is stated, and that is an alleged conflict with decisions of this and other Federal courts. We submit that such conflict does not exist.

POINT B. Prior to the passage of the Act of April 12, 1926, Nancy had conveyed all her interest in the lands in question, together with the rents and royalties therefrom, to her trustees, and the 1926 Act could not affect the title vested in these trustees. *United States* v. *Ickes,* 73 F. (2d) 844. The Court of Appeals therefore correctly held that payment of royalties to these trustees under trust deeds made at a time when the land was not restricted was binding on Nancy.

POINT C. Nancy cannot accept the benefits of the trust estate and at the same time repudiate payments made by Shell to her trustees. The trustees either paid all the royalty moneys directly to Nancy or used them for her benefit, and by accepting such royalties she ratified the acts of the trustees in collecting them. *Bradburn, et al.,* v. *First Christian Church, et al.,* (C. A. 10) 160 F. (2d) 341; and *Bradburn* v. *McIntosh, et al.,* (C. A. 10) 159 F. (2d) 935.

POINT D. The trial court correctly held that the judgment rendered in *Chisholm, et al.,* v. *House, et al.,* being No. 443-Civil in the United States District Court for the Eastern District of Oklahoma, and affirmed by the Tenth Court of Appeals in *Chisholm* v. *House,* 160 F. (2d) 632, was *res judicata* of the case at bar. *Baird* v. *United States,* 96 U. S. 430, 24 L. ed. 703. In the *Chisholm* case Nancy and the Government as intervener sued Shell for royalties payable under this same oil and gas lease for a part of the same period involved in this action, and all of such royalties were due and payable, if ever, prior to the filing of this action. In the *Chisholm* case and in this case (*1*) the plaintiffs were identical (Nancy and the United States in her behalf); (*2*) the defendant was the same (Shell); (*3*) the cause of action was the same (an action for royalties

payable under the same oil and gas lease); and (4) all royalties sued for in both cases were due and payable, if ever, prior to the filing of the *Chisholm* case against Shell.

POINT E. The Chisholm case was between the same parties, involved the same oil and gas lease, and Nancy contended therein that royalties payable under this lease were restricted by the 1926 Act. That issue was determined contrary to her contention and, whether the *Chisholm* decision is right or wrong, having litigated the same issue between the same parties, Nancy is now estopped to litigate it again. *Tait, Collector of Internal Revenue,* v. *Western Maryland Railway Co.,* 289 U. S. 620, 77 L. ed. 1405.

ARGUMENT.

Point A.

In the absence of a regulation by the Secretary of the Interior to the contrary, royalties payable under an oil and gas lease on restricted lands are payable to the owner of such royalty or his nominee.

Commencing on page 21 of her brief petitioner argues that:

> "The qualified restrictions of the Act of April 12, 1926, Sec. 1, attach upon payment of oil royalties from restricted land to the same extent as upon the land itself."

The Court of Appeals held that, while the 1926 Act reimposed restrictions upon the alienation of Nancy's land or any interest therein, *it did not deprive her of her right to collect the money payable to her as royalty under the existing oil and gas lease either personally or through someone designated by her.* Even Nancy in her amended peti-

tion (R. 79) conceded that subsequent to the Act of April 12, 1926, oil and gas royalties due her could be paid to her personally (R. 88). As a matter of fact, from November 1, 1937, to October 1, 1939, a part of the royalties due under the existing oil and gas lease was paid directly to Nancy (R. 328) and no attack is made upon such payments. Thus it will be seen Nancy concedes that even after the 1926 Act it was *not necessary* to pay royalties to the Secretary of the Interior, but that they could be paid directly to her. We submit that there was nothing in the 1926 Act or in the 1908 Act which required payment of royalties to the Secretary of the Interior unless and until the Secretary, by proper regulation, required such payment to him. *Parker* v. *Richard,* 250 U. S. 235, 63 L. ed. 954.

At the bottom of page 22 of her brief petitioner argues that under the 1926 Act the County Court must approve "any alienation of an interest less than the fee, *including the daily severance from the land of oil and gas." The receipt of royalties payable under the existing oil and gas lease did not constitute an alienation. The alienation took place at the time the oil and gas lease was made in 1912, with the approval of the Secretary of the Interior.* The royalty money was merely the income resulting from such oil and gas lease. *It was payable to petitioner regardless of whether she signed a division order or not.* The lease requires such payment and there is nothing in the 1926 Act, the 1908 Act, or any other act of Congress which requires County Court approval before making payment of such royalty money to petitioner or to her nominee. We concede that Nancy could not alienate her royalty interest without proper County Court approval, *but she could collect the money due as royalty as it became due either in her own person or through an agent nominated by her.* Such was the holding of the Court of Appeals in this and also in the

companion case between the same parties. *Chisholm* v. *House,* 160 F. (2d) 632.

The question here involved is not whether Nancy could alienate her mineral interest in the land in question, but whether she or her nominee could collect the money payable under the existing oil and gas lease as royalty. The Court of Appeals in this case, in discussing the companion case of *Chisholm* v. *House,* 160 F. (2d) 632, said:

> "* * * We said that the 1926 Act 'in no sense impinged on the right to receive payment of royalties under oil and gas leases' the restrictions upon which had been removed by the Secretary of the Interior, and not re-imposed by him before the effective date of the 1926 Act. In sum, we said that *the continued receipt of royalties under a lease on devised allotted lands did not amount to a conveyance of an interest in allotted lands within the meaning of the 1926 Act.* * * *" (R. 464)

Nancy overlooks the fact that *Section 2* of the *Act of Congress of May 27, 1908, 35 Stats. 312, does not prohibit the Secretary of the Interior from permitting payments of royalties directly to a restricted Indian or to his nominee.* That portion of Section 2 relating to the execution of oil and gas leases on restricted lands states:

> "* * * *Provided,* that leases of restricted lands for oil, gas, or other mining purposes, * * * may be made with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise:"

Pursuant to this section Linda Yarhola, while still the owner of this land, on February 12, 1912, executed the oil and gas lease involved in this action (R. 269). This oil and gas lease was properly approved by the Secretary of the Interior (R. 275). Paragraph 12 of this oil and gas lease

(R. 274) provides that in the event restrictions on alienation shall be removed from the leased premises the lease shall be released from the supervision of the Secretary of the Interior, and thereafter all payments required to be made under the terms of said lease shall be made to the lessor or to the then owner of the said lands in person "or at such other place as the said lessor or his assigns may from time to time designate in writing." Under this oil and gas lease all payments were properly made to the Secretary of the Interior until Roxana Petroleum Company, now Shell Oil Company, Incorporated, the respondent herein, received a letter from the Superintendent of the Five Civilized Tribes, dated April 2, 1921, advising it "that *supervision is hereby relinquished over the above described land and lease.*" (R. 328-329). Thereafter payments due under the lease were duly made to Nancy's guardian until she was restored to competency in 1924, when she designated certain trustees to receive payment in her behalf. From that time payments were properly made to her designated trustees or to petitioner personally.

The decision in this case does not conflict with any of the cases cited by petitioner.

Nancy misinterprets the decision of the Court of Appeals in this case and then cites cases to show that such decision as so misinterpreted by her is in conflict with decisions of this and other courts. On page 2 she states:

> "The court below held that the Secretary's approval of the oil and gas lease was in effect a removal of restrictions and the land remained unrestricted unless restrictions were reimposed by the Secretary of the Interior."

We have read the opinion of the Court of Appeals very carefully and find no language therein which supports this

conclusion. At no place in the opinion does the court say that the Secretary's approval of the oil and gas lease effected a removal of restrictions. On the contrary, the very lease involved in this action was restricted by the Secretary of the Interior until such restrictions were removed by letter dated April 2, 1921 (R. 328). Section 2 of the 1908 Act does not require the Secretary of the Interior to impose restrictions upon royalties payable under oil and gas leases approved by him. It merely provides that such leases shall be made with the Secretary's approval under rules and regulations provided by him. Under Section 2 the Secretary could require the payment of royalties upon restricted lands to be made to him *or could permit such payments to be made directly to the owner thereof.* The Court of Appeals merely held that it was within the province of the Secretary to determine whether royalties should be paid to him or to the Indian owner and that in the absence of any action on his part the royalties were payable to the owner. This holding of the Court of Appeals is stated in the following language:

> "* * * But regardless of the effect of the 1926 Act upon these challenged instruments, we are convinced that under the authority of the *Chisholm* case, which we reaffirm, it did not affect Nancy's right to the continued receipt of royalty from the devised lands, or her right to designate some one to receive it for her." (R. 465)

Concededly this land was restricted in the hands of Nancy subsequent to the passage of the 1926 Act. She could not alienate it after that date without approval of the County Court. She did not do so. However, in the absence of a contrary regulation by the Secretary of the Interior she could collect any moneys due her as royalties under the existing oil and gas lease.

On page 6 of her brief Nancy states that the validity of Section 1 of the Act of April 12, 1926, 44 Stat. 239, is involved in this action. This statement is incorrect. We concede the validity of this statute and the Court of Appeals did not hold it invalid. Neither did the Court of Appeals hold, as stated by Nancy on page 7 of her brief, that after the passage of the 1926 Act Nancy could convey her devised land without the approval of the proper County Court.

On page 10 of her brief Nancy sets out the "Reasons Relied on for Allowance of the Writ." *The only reason she gives is the alleged conflict between the opinion in this case and certain opinions of this and other Federal courts.* We respectfully submit that *such conflict does not exist.* Not a single case cited by her conflicts with the opinion of the Court of Appeals in the present case. We shall consider each of these cases in the order cited by Nancy.

United States v. *Noble,* 237 U. S. 74, 59 L. ed. 844, held that a Quapaw Indian could not assign rents and royalties which were to accrue under a mining lease. This case does not conflict with the case at bar, since Nancy did not assign her royalties (except prior to the passage of the 1926 Act when her land was unrestricted), but such royalties were either paid directly to Nancy, paid to trustees who were vested with title prior to the passage of the 1926 Act, or paid to her nominee. The Court of Appeals in the present case expressly stated:

> "This view does not derogate from the established rule that a conveyance of rents and profits issuing out of allotted lands amounts to an assignment of interest in those lands within the meaning of the 1926 Act." (R. 465),

thereby expressly holding that the 1926 Act was applicable to any assignment of rents and royalties.

Parker v. *Richard,* 250 U. S. 235, 63 L. ed. 954: An oil and gas lease was approved by the Secretary of the Interior under Section 2 of the Act of May 27, 1908, and royalties payable thereunder had been collected by the Superintendent for the Five Civilized Tribes. The question was whether upon the death of the allottee the Superintendent had the right to continue collecting such royalties. The lease was apparently similar to the one involved in the case at bar. However, *contrary to Nancy's contentions,* this Court pointed out in that case that *the royalties were restricted, not by Congress but by the terms of the lease and the regulations of the Secretary of the Interior.* In so holding this Court said:

> "* * * These royalties have been collected by the defendants *pursuant to the terms of the lease and the regulations of the Secretary of the Interior* and are being held by them in trust under a *provision in the regulations* which authorizes them to retain and care for such funds 'until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs.' * * *." (1 c. 956)

Thus it will be seen that, contrary to Nancy's contentions, *the restrictions on the payment of royalties* under an oil and gas lease covering restricted land *are imposed by "the terms of the lease and the regulations of the Secretary of the Interior* * * * 'until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs.' " The only difference between the *Parker* case and the case at bar is that the restrictions imposed by the lease and the regulations of the Secretary were not removed in the *Parker* case, whereas *such restrictions were*

removed in the case at bar. (R. 328) We concede that if the restrictions had never been removed from this oil and gas lease it would be necessary to continue paying the royalties to the Secretary of the Interior. But such is not the fact in this case. Restrictions on royalty payments were first imposed by the Secretary when the lease was made in 1912. They were removed by the Secretary in 1921 (R. 328) and were not reimposed by the Secretary until November, 1942, (R. 313) many years after the royalty payments complained of herein were made.

Brader v. *James,* 246 U. S. 88, 62 L. ed. 591, merely held that in 1907 a full blood Choctaw Indian could not convey her inherited land without approval of the Secretary of the Interior and that such attempted conveyance was void. We fail to see where this conflicts with the decision in this case.

Holmes v. *United States,* (C. A. 10) 53 F. (2d) 960, holds that where a full blood Choctaw Indian allottee died and left issue, one of whom was born after March 4, 1906, the interest in such land owned by the heirs born prior to March 4, 1906, could not be sold without proper approval. Nancy contends this decision is squarely in conflict with the present case, but we fail to see any similarity whatever. The land was restricted and it could not be sold without proper approval. Likewise, the land in the case at bar was restricted subsequent to 1926 and could not be sold without proper approval, but that is not the question. The question decided by the Court of Appeals is that royalties payable under a pre-existing oil and gas lease upon which restrictions had been removed could be paid directly to Nancy or to her nominee, unless and until the Secretary requested their payment to him.

Brown v. *United States* (C. A. 8), 27 F. (2d) 274, held that a trust deed for 21 years covering restricted land, and which gave the trustees broad powers as to the sale and disposition of the land, must be approved by the County Court. Again we point out that this land was restricted at the time the trust deed was made, whereas *Nancy conveyed her land to the trustees in 1924 at a time when her land was free from all restrictions.*

Grisso v. *United States* (C. A. 10), 138 F. (2d) 996, held that the Act of May 10, 1928, placed the same restrictions on both surplus and homestead lands inherited by full blood Indians regardless of the dates of birth of the heirs. It did not even discuss the question involved here.

Tiger v. *Sellers* (C. A. 10), 145 F. (2d) 920, held that a full blood heir of a Creek Indian allottee could not assign future rents without approval of the County Court. It does not say that such heir could not collect such rents either personally or through some agent designated by him.

United States ex rel. Warren v. *Ickes* (App. D. C.), 73 F. (2d) 844, *holds contrary to Nancy's contention.* In that case the homestead allotment of a full blood deceased Creek Indian descended to his widow and to his son born after March 4, 1906. In 1915 the heirs executed an oil and gas lease similar to the one involved in this case. The lease provided that it would be released from the supervision of the Secretary of the Interior upon the date restrictions were removed. The son died in 1930 and the widow, with the approval of the County Court, assigned 1/3 of the royalties held by the Secretary to Warren prior to the passage of the Act of January 27, 1933. The Secretary contended that the 1933 Act reimposed restrictions on this fund, but *the court held that the 1933 Act could not reimpose restrictions*

on the royalties theretofore conveyed to Warren. Likewise, in the case at bar the 1926 Act could not reimpose restrictions on the lands conveyed to the trustees in 1924.

United States v. *Gypsy Oil Company,* (C. A. 8) 10 F. (2d) 487, held that an oil and gas lease on surplus land executed by the guardian of a full blood minor heir with the approval of the County Court did not require approval by the Secretary of the Interior. This case does not state how the royalties should be paid, but obviously, since approval by the Secretary was not necessary, the royalties would be payable to the minor's guardian until such minor became of age, after which they would be paid directly to him or to his nominee. Likewise, when land of an Indian heir is sold with the approval of a County Court, the consideration therefor is paid to the Indian heir.

The above are the only cases cited by Nancy as being in conflict with the decision of the Court of Appeals in the case at bar, and we respectfully submit that not a single case cited conflicts in any particular with this case. On the other hand, this case is consistent with and follows *Chisholm* v. *House* (C. A. 10) 160 F. (2d) 632. In concluding this proposition we respectfully submit that, since the only reason relied upon by petitioner for allowance of a writ of *certiorari* is a conflict in decisions which does not exist, the application should be denied.

Point B.

A valid and binding trust estate for 21 years had been created by a valid conveyance prior to 1926. Neither the Act of 1926 nor any subsequent acts of Nancy had any effect on this estate. Shell's payments to the trustees were valid and regular and discharged in full Shell's obligations under the lease as regards royalty payments.

We do not question the right of Congress to reimpose restrictions on property belonging to members of the Five Civilized Tribes, but such restrictions can apply only to property vested in the Indian at the time of the passage of any such act. *United States* v. *Ickes,* 73 F. (2d) 844. In so far as this present case is concerned, it is immaterial whether the Act of April 12, 1926, did or did not reimpose restrictions, *since prior to the passage of such act Nancy had conveyed all her interest in the lands in question, together with the rents and royalties therefrom, to her trustees.* By trust deed dated June 14, 1924, (R. 91) and supplemental trust deeds dated September 9, 1924 (R. 25), April 14, 1925 (R. 33), and September 24, 1925 (R. 33), Nancy did "grant, bargain, sell, deed and convey unto" Washington Grayson and Hill Moore her undivided 2/5 interest in the Linda Yarhola allotment, being the NW4 of Section 9, and other property, in trust for a period of 21 years from June 14, 1924 (R. 33). The trustees had exclusive control of said property and were expressly "given and granted the power to sell and dispose of any portion of said estate, real or personal, when it appears to them to be for the best interest of said estate so to do, and to invest or reinvest the proceeds thereof as herein authorized." (R. 95)

Nancy concedes this trust agreement, as amended,

vested title in the trustees. While in the trial court she alleged the invalidity of the 1924 trust deed and amendments thereto, in this Court she has abandoned all claim that such agreements are invalid. In describing this trust agreement at page 4 of her brief petitioner states:

> "* * * petitioner executed an express trust *vesting title in all her property,* including her devised two-fifths interest in said allotment, *in the trustees.*"

At page 7 of her brief petitioner further concedes:

> "*It is conceded that at the time of the execution of the trust conveyances* prior to April 12, 1926, petitioner's devised two-fifths interest in the allotment of Linda Yarhola *was not restricted against alienation* by any Act of Congress."

Since, as petitioner states, this trust agreement, as amended, vested title to all her property in the trustees at a time when her land was unrestricted, *she had alienated her title prior to the passage of the Act of April 12, 1926.* It is therefore necessarily conceded that these trust agreements and the payments of royalties made by respondent to the trustees prior to December 19, 1929, were validly made.

Concededly the Linda Yarhola lands were unrestricted at the time the trust agreement was executed on June 14, 1924, and the supplemental trust agreements were executed in 1924 and 1925. *At the time these trust deeds were executed Nancy had the same power to deal with her property in creating a trust estate as any other citizen of the State of Oklahoma.* In 1924 and in 1925, when the trust agreement and the various supplements thereto were executed, Section 8474 of the 1921 Compiled Oklahoma Statutes was in effect. That statute reads as follows:

> "*Estate in Trustees.* Except as hereinafter otherwise provided, every express trust in real property,

valid as such, in its creation, *vests the whole estate in the trustees,* subject only to the execution of the trust. *The beneficiaries take no estate or interest in the property,* but may enforce the performance of the trust."

The above trust agreement, as amended, under the Oklahoma statute *vested the whole estate in the trustees and petitioner as beneficiary owned no estate or interest in the property.* Such was the status of this property at the time Congress on April 12, 1926, amended Section 9 of the Act of May 27, 1908, to include devisees. (44 Stat. 239) *On that date the title to this land was vested in the trustees and Nancy owned no estate or interest therein.* She merely had a right to enforce the performance of the trust.

On December 19, 1929, Hill Moore, one of the original trustees, resigned and D. W. Johnston was appointed as successor trustee (R. 39). Commencing on page 24 of her brief Nancy argues this substitution of trustee constituted an alienation of her property and required County Court approval. She entirely overlooks the fact that *she did not own this property in 1929. It had been conveyed to her trustees in 1924.* Even the procedure to be followed upon resignation of a trustee had been provided for in the original trust agreement by the following language:

"It is further agreed by and between the parties hereto that in the event either of said *trustees shall* die, *resign,* or for any reason become unable to act, then *said remaining trustee shall continue to act* until such time as the party of the first part and the remaining trustee shall agree upon some suitable party to act with said remaining trustee, and first party shall have constituted said person one of the trustees herein and hereunder by appropriate instrument in writing." (R. 96)

An identical provision was contained in the amended trust deed dated September 9, 1924 (R. 28).

Thus by a specific provision in the original conveyance, as amended, the manner of perpetuating the trust in the event of resignation of one of the trustees was provided for. Insertion of such a clause conclusively refutes any contention that the trust terminated upon the death or resignation of Hill Moore. Upon the resignation of Hill Moore, Washington Grayson continued to act until he and Nancy, by an instrument in writing dated December 19, 1929 (R. 39), designated D. W. Johnston as his successor. The trial court found that the appointment of the successor trustee was made in accordance with the provisions of the original trust agreement as amended (R. 122, Finding of Fact 14). *Even if the instrument appointing D. W. Johnston as one of the trustees was absolutely void, still that did not reinvest title to the property in Nancy, since the trust would continue with Washington Grayson acting as sole trustee.*

An identical trust instrument appointing a successor trustee was considered by the Court of Appeals in *Chisholm* v. *House*, (C. A. 10), 160 F. (2d) 632, 639. That case involved the same parties and the same oil and gas lease involved herein, and the court held that royalties paid to the successor trustee under identical instruments were properly paid. We respectfully submit that the decisions of the Court of Appeals in this case and in the *Chisholm* case were correct. Under the facts we submit there is no merit to Nancy's contention that the instrument of December 19, 1929, appointing a successor trustee was such an alienation of land as was prohibited by the Act of April 12, 1926.

According to an itemized statement of the trustees (R. 436-459), the money paid by Shell to such trustees prior

to November 1, 1937, was *paid to and accepted by Nancy.* On December 15, 1937, Nancy acknowledged the accuracy of this itemized statement and released and discharged the trustees and the sureties upon their bonds from all further liability (R. 435).

In concluding this point we respectfully submit that Nancy's trustees obtained title to this land prior to the passage of the 1926 Act; that the substitution of trustee in 1929 did not reinvest title to such land in Nancy; and that the Court of Appeals correctly held the royalties paid by Shell to such trustees, and by them turned over to Nancy, were properly paid.

POINT C.

Nancy actually received all royalties paid by Shell to her trustees, and by accepting such royalties she ratified the acts of her trustees and is estopped to recover such royalties from Shell a second time.

Nancy alleged in her petition (R. 88) that the royalties should have been paid to her. They were. The fact that such royalties passed through the hands of her trustees is immaterial, since the record shows that all of them were turned over to Nancy by her trustees. According to an itemized statement of the trustees (R. 436-459), the money paid them by Shell was either paid directly to Nancy or was used for her benefit. Nancy acknowledged the accuracy of this itemized statement and released and discharged the trustees and the sureties upon their bond from all further liability to her by a satisfaction dated December 15, 1937 (R. 435). From December 30, 1929, to November 1, 1937, Shell paid Nancy's trustees $18,393.36 (R. 327) and the trustees paid to Nancy personally $37,807.51 (R. 442-459), nearly $14,000 more than they received from Shell. In addition, many payments were made to others in behalf of

Nancy (R. 442-459). The balance was turned over to Nancy when the trust was terminated (R. 435). It is now conceded that Nancy was competent at the time she accepted these royalty payments and at the time of the release admitting receipt of the royalties paid by Shell to the trustees. She does not attempt to set aside this release in this present action. She could not do so since the trustees are not parties to this action. *By accepting payment for these royalties from the trustees she ratified their actions and she may not now be heard to complain.* In *Bradburn, et al.*, v. *First Christian Church, et al.*, (C. A. 10) 160 F. (2d) 341, which involved an attempt by Nancy to collect a second time payments made to the Cussehta trustees, the Court said:

> "Nancy and Lessey took the benefits of the Cussehta trust under the decree of the District Court of Okfuskee County, and thereby ratified the validity of the trust. *Nancy* and Lessey *could not accept and retain the benefits of the trust and repudiate the payment made by the Wrights to the trustees* and the release of the Wright mortgage made by the trustees. • • •" (1 c. 344).

In *Bradburn* v. *McIntosh, et al., Bradburn* v. *Box, et al., Bradburn* v. *Dill, et al.*, and *Bradburn* v. *Wood, et al.*, (C. A. 10), all reported at 159 F. (2d) 935, the Court said:

> "Moreover, in Numbers 3302, 3303, and 3306, Nancy seeks to take the benefits of the provisions of the promissory notes, other than the promise in each to pay the principal and interest to the trustees, and of the respective mortgages given to secure such notes, and to repudiate that portion of the notes providing for payment to the trustees. *If a principal elects to ratify any portion of an unauthorized transaction by one purporting to act as his agent, he must ratify the whole of it.* He cannot avail himself of that which is

advantageous to him and repudiate that which is detrimental; *approbans non reprobat*—one approbating cannot reprobate." (2 c. 938.)

Nancy attempts to do in this case what the Court of Appeals held she could not do under these identical trust agreements, namely, accept from the trustees the royalty payments made by Shell and then repudiate the authority of the trustees and attempt to collect those same royalty payments a second time. *Regardless of the validity of the trust agreements, Nancy, having accepted payment of the royalties, thereby ratified the acts of her trustees and she may not now disaffirm the authority of such trustees to collect those royalties.*

From November 1, 1937, to October 1, 1939, a 1/10 royalty interest under the Linda lease was paid at Nancy's request directly to her (R. 328). The remaining 2/5 interest was paid to her nominee, Roy Bradburn (R. 328), under a transfer order authorizing such payments to be made to him as her trustee (R. 306). Roy Bradburn was Nancy's husband (R. 435). This transfer order did not pass any title to the oil. That was done by the original oil and gas lease, which, unlike many present day leases, did not provide for payment of oil in kind but for payment "as royalty, the sum of *12½ per cent of the gross proceeds*" (R. 270). This money was due whether a transfer order or division order was signed or not. The transfer order merely determined the method of payment. Nancy could have obtained the same results by a letter or even by a telephone call requesting Shell to pay the royalty money to her agent and husband, Roy Bradburn. She was not required to collect this money personally.

At the request of Nancy's attorney Shell furnished a copy of all payments it had made to Roy Bradburn as

trustee for use in a case where she was claiming ownership of property which had been purchased by Roy with trust funds, and in the case of *Keck* v. *Bradburn,* in the United States District Court for the Eastern District of Oklahoma, Judge RICE held that the money Roy Bradburn used in the purchase of certain property at a resale of land for taxes belonged to Nancy and that he held the title in trust for her (R. 243). By her action in claiming property purchased with the trust funds Nancy ratified the acts of the trustee in collecting this money and *she may not claim property purchased by the trustee and at the same time deny his right to collect moneys due her.*

Shell went much farther in its proof in the case at bar than was necessary. It not only showed that it made payment to the parties designated by Nancy to receive such payments, but it further showed that such moneys were turned over to Nancy or used for her benefit. We respectfully submit that, even if there had been no valid trust agreement or division orders and Shell had paid this royalty money to an absolute stranger, if such stranger turned the money over to Nancy she could not keep it and then collect the same royalty money a second time from Shell. In view of this fact, it is immaterial what authority the trustees had to collect this royalty money in the first place, since all of it found its way into Nancy's hands.

POINT D.

The trial court correctly held that the *Chisholm* judgment is *res judicata* of the case at bar.

Nancy attempts to relitigate matters which were or could have been determined in *Chisholm, et al.,* v. *House, et al.,* case No. 443-Civil, in the United States District Court for the Eastern District of Oklahoma, hereinafter referred

to as the *Chisholm* case. A judgment was entered in the *Chisholm* case on March 24, 1945, in favor of Shell and against Nancy (R. 410). The Court of Appeals affirmed that judgment in so far as it related to Shell. *Chisholm* v. *House,* 160 F. (2d) 632. It was stipulated that the judgment in the *Chisholm* case is final as to Shell (R. 235). The trial court concluded the *Chisholm* case was *res judicata* of the case at bar (R. 126-127).

Issues in Chisholm case:

The *Chisholm* case went to trial on the amended complaint in intervention in behalf of the United States (R. 366), which was adopted by Nancy (R. 231). There were two counts to this amended complaint, but Shell was the only party defendant to the second count (R. 389). By this second count Nancy set out the ownership by Shell of the Linda Yarhola oil and gas lease covering the NW¼ of Section 9, and alleged that under said oil and gas lease the allottee was to be paid a 1/8 royalty upon the sales of gas and oil produced from said land (R. 389-390); that between the dates of April 28, 1924, and November 29, 1937, Shell had wrongfully and illegally paid the royalties from the sales of oil and gas due under said oil and gas lease and that said royalties were owned by Cussehta during his lifetime and *by Nancy from November 13, 1936, until November 29, 1937* (R. 391); and prayed on the second count for an accounting against Shell as to all royalties allegedly due and owing Cussehta from April 28, 1924, to November 13, 1936, *and for royalties owing to Nancy from Cussehta's death on November 13, 1936, to November 29, 1937,* (R. 392) in the sum of $72,403.57, "and in such further amount as will appear to be due and owing upon said accounting." (R. 392)

Anticipating that Shell would defend the Chisholm action for royalties on the ground that it had made proper payment to Cussehta's trustees, Nancy attempted to avoid this defense by alleging Cussehta's actual incompetency (R. 374) and the invalidity of the trust agreements under the Act of April 12, 1926 (R. 386).

Issues in the case at bar:

The case at bar was tried on Nancy's amended petition (R. 79). In this amended petition Nancy also set out the ownership by Shell of the identical Linda oil and gas lease covering the NW¼ of Section 9 (R. 82-83), and alleged she had not received any part of the proceeds from the sale of the oil and gas produced and sold therefrom (R. 83). This oil and gas lease provided for payment "as royalty" of "the sum of 12½ per cent of the gross proceeds of all crude oil extracted from the said land." (R. 270) The lease further provided that in the event it should be released from the supervision of the Secretary of the Interior all payments required to be made "shall thereafter be made to lessor or the then owner of said lands in person or be deposited to the credit of said lessor or his assigns," etc. (R. 274) Nancy prayed judgment against Shell for 2/5 of the royalties payable under this lease from June 14, 1924, to November 13, 1936, and for 1/2 of the royalties payable under the terms of said lease from November 13, 1936, to August 1, 1941 (R. 90-91).

As in the *Chisholm* case, in the case at bar Nancy attempted to anticipate Shell's defense of payment to her trustees by alleging actual incompetency (R. 82) and the invalidity of the trust agreements under the Act of April 12, 1926 (R. 88).

Identical issues in Chisholm case and the case at bar:

It was stipulated that an identical oil and gas lease was involved in the *Chisholm* case and in the case at bar (R. 241). This means that an identical royalty clause was involved and *each case was an action for the recovery of royalties payable under the same oil and gas lease.* Nancy acquired a 2/5 interest in the royalty under the Linda lease by devise from her mother Linda who died on February 5, 1917 (R. 80). She acquired an additional 1/10 interest in the royalties payable under the terms of this lease from her father Cussehta who died on November 13, 1936 (R. 120). On November 2, 1942, the date on which Nancy intervened in the *Chisholm* case and made Shell a party defendant (R. 345), she was the owner of a 1/2 royalty interest under the Linda lease. As the owner of such royalty interest she was entitled to all unpaid royalties, if any, accruing to such interest. Since Shell assigned this oil and gas lease to Sinclair Prairie Oil Company on August 9, 1939 (R. 241), *all royalties which Nancy claimed Shell owed her under the terms of this oil and gas lease had accrued prior to her intervention in the Chisholm case.* On the date of such intervention she had only one cause of action against Shell, *i. e.,* a cause of action for all royalties allegedly due her as the owner of a 1/2 royalty interest under the Linda lease. It is fundamental law that she could not split this single and indivisible cause of action and make it a basis of successive recoveries of portions thereof.

> "* * * Thus, if there are several sums due under one contract, and a suit is brought for a part only, a judgment in that suit will be a bar to another action for the recovery of the residue." *Baird* v. *United States,* 96 U. S. 430, 432, 24 L. ed. 703, 705.

Mr. Justice SANBORN, in *Deweese* v. *Smith,* (C. A. 8) 106 Fed. 438, 442, states the rule as follows:

> "* * * The rule that a judgment for a part of an entire demand which is due at the time the action is brought is an election to take that part in satisfaction of the whole, and that the judgment estops the plaintiff from maintaining another action for the residue of the demand, is conceded to be well settled, sound and just. *Baird* v. *U. S.,* 96 U. S. 430, 432, 24 L. ed. 703. * * *" (p. 442)

In spite of this basic principle of law Nancy attempts to do what the law forbids, to-wit, relitigate matters which were or could have been determined in the *Chisholm* case. In the *Chisholm* case both Nancy and the United States attempted to recover royalties allegedly due Nancy under the Linda Yarhola oil and gas lease. In the case at bar Nancy and the United States asserted an identical cause of action—*i. e.,* a cause of action to recover royalties allegedly due Nancy under the Linda Yarhola lease. *Nancy and the United States in her behalf were the plaintiffs in each case. Shell was a defendant in each case. The same oil and gas lease was involved in each case.* The same royalty provision was involved in each case. *The royalties sued for in each case accrued prior to the filing of the Chisholm case.* In other words, both the *Chisholm* case and the case at bar are actions to recover royalties allegedly due the same party, from the same defendant, under the same royalty provision of the same oil and gas lease, all of which accrued prior to the filing of the *Chisholm* case against Shell. While the United States was a party below, it dismissed its appeal to the Court of Appeals and is no longer a party to this action.

Nancy filed her petition in intervention in the *Chisholm*

case wherein she named Shell as a defendant on November 2, 1942, three years after the latest date for which she attempts to recover royalty allegedly due her in this case. On that date every dollar allegedly due her in this case had accrued. *The Chisholm judgment is res judicata as to all royalties accruing prior to the date it was commenced against Shell.*

In re Garment Center Capitol, Inc., (*Irving Trust Co. et al.*, v. *American Silk Mills, Inc.*) (C. A. 2) 93 F. (2d) 667, involved a state of facts similar to those involved in the case at bar. Instead of an oil and gas lease that case involved a written lease of a loft for use by a garment company. The rental was not paid and the garment company was evicted. The leasing agreement provided that in case of eviction for nonpayment of rentals the lessee should be liable during the remainder of the term for any loss of rental. Under this lease contract the plaintiff sued the defendant on September 20, 1933, for loss of rental prior to and including August, 1933. (Just as in the *Chisholm* case Nancy sued Shell for 1/10 of the royalty allegedly due under the Linda lease prior to November 29, 1937.) However, defendant was not served and did not appear until October 2, 1934, *at which time any rental lost during September was due and payable under the lease contract.* Judgment was rendered for the plaintiff in that first action. Thereafter this action was brought to recover rentals for *September* and subsequent months. Both the trial court and the Court of Appeals denied a recovery for September on the ground that rental for that month was due and payable when the first action was commenced, *and by not including it in that case the rental for September was waived.* In this connection Mr. Justice Hand said:

"The final matter for consideration is whether the

plaintiffs ought to have been allowed additional damages equivalent to the rent for September, 1933. In spite of the technicality of the defense that the damages for loss of the September rent should have been included in the former action, we think *it must be sustained.* In the prior action, though the summons issued September 20, 1933, and the complaint was as of that date, there was no service upon the defendant, and the appearance on its behalf was not until October 2, 1934. Under the provisions of the New York Civil Practice Act, the action was not commenced until the last-mentioned date. Sections 218, 237. *At that time damages for loss of the September installment of rent were already due and could, and under well-known principles should have been included in the action. Panoualias* v. *National Equipment Co.,* 2 Cir., 269 F. 630; *Snell* v. *J. C. Turner Lumber Co.,* 2 Cir., 285 F. 356. * * *" (1 c. 669)

The material facts in the *Garment* case and in the case at bar are similar. In the *Garment* case the plaintiff commenced a suit in October, 1933, to recover rentals due for August and prior months. In the case at bar plaintiffs brought the *Chisholm* case in 1942 to recover royalties due prior to December 29, 1937. In the *Garment* case plaintiff later attempted to collect rentals due for September, 1933. In the case at bar plaintiffs attempt to collect royalties allegedly due both subsequent and prior to December 29, 1937. In the *Garment* case the court held that since the September installment of rent was due when the first action was commenced it should have been included in that action, and that the first action was *res judicata* as to any payments which might have been owing for September, 1933. Likewise, in the case at bar the royalties allegedly due under the Linda Yarhola lease from November 28, 1937, to October 1, 1939, accrued prior to the filing of the

Chisholm case against Shell on November 2, 1942, and at the time the *Chisholm* case was filed against Shell the royalties allegedly due on oil produced between November 28, 1937, and October 1, 1939, *"were already due and could, and under well-known principles should, have been included in the action."*

In addition, Nancy likewise attempts in the case at bar to collect royalties allegedly due under the terms of this same oil and gas lease for the same period as that involved in the *Chisholm* case, to-wit, April 28, 1934, to November 29, 1937. She does this on the theory that the interest for which she sues in this case is not the same as the interest involved in the *Chisholm* case. In other words, at the trial of the *Chisholm* case she voluntarily limited her proof to a certain portion of the royalty allegedly due her and she now states she is suing for another and different portion of that same royalty.

Plaintiff is attempting to do what this Court said could not be done in *Baird* v. *United States,* 96 U. S. 430, 24 L. ed. 703. That case involved a contract for fifteen locomotives at a fixed price plus any advance in the cost of labor and materials used in their construction, and plus any damage resulting from the preference given this order over other contracts. The United States paid the agreed price and certain additional costs of labor and materials. Thereafter an action was brought to recover the damages resulting from the preference given this order and judgment was rendered in favor of the plaintiff. In the second action plaintiff sought to recover the residue of the amount of the advance in the labor and materials. The Court of Claims found that, *although plaintiff had correctly stated the amount due* under the contract, his action was barred

by the judgment in the first case. In affirming this judgment this Court said:

> "But there is another objection to the recovery which is equally good. It is well settled that, where a party brings an action for a part only of an entire indivisible demand, and recovers judgment, he cannot subsequently maintain an action for another part of the same demand. *Warren* v. *Comings,* 6 Cush. 103. *Thus, if there are several sums due under one contract, and a suit is brought for a part only, a judgment in that suit will be a bar to another action for the recovery of the residue.* Here was a contract by which the Government was bound to pay for the engines in accordance with terms agreed upon. The entire price to be paid was not fixed. A part was contingent, and the amount made to depend upon a variety of circumstances. *When the former action was commenced in the Court of Claims, the whole was due.* Although different elements entered into the account, they all depended upon and were embraced in one contract. The judgment, therefore, for the part then sued upon is a bar to this action for the 'residue'." (1 c. 705)

In the *Baird* case the Court of Claims found the United States had *not* paid all that was due the plaintiff under its contract, but nevertheless it was held that the first action was *res judicata,* since the amount claimed in the second action was due and owing when the first action was filed. We call special attention to the statement of this Court to the effect that:

> "Thus, if there are *several sums due under one contract,* and a suit is brought for a part only, a judgment in that suit will be a bar to another action for the recovery of the residue."

Let us apply the above statement to the case at bar. It is Nancy's contention that there are *several sums due*

under one contract, namely, royalties payable from month to month under the Linda Yarhola lease. The trial of the *Chisholm* case was limited to a part only of the amount she now claims is due. Nevertheless, as was said by this Court in the *Baird* case, the judgment in the *Chisholm* case is a bar to this action for the recovery of the residue.

Nancy does not and cannot deny that her action is one to recover royalties payable under the royalty provision of the Linda oil and gas lease. In order to state a cause of action she alleged that she was the owner of certain mineral rights and as such owner was entitled to recover certain royalties under the lease and that she had not been paid. *In considering the pleadings in both cases Nancy has alleged that when she intervened in the Chisholm case she was the owner of 1/2 of the royalties under the Linda oil and gas lease and entitled to recover all unpaid royalties* accruing to such 1/2 interest from 1924 to 1939. In one suit she attempted to recover 1/10 of them down to November 29, 1937. In this one she attempts to recover the balance. Her cause of action has not changed—merely the amounts sued for. All were due and owing, if ever, at the time of the first suit.

It must be remembered that Nancy's right to recover in this action is based upon her ownership of the royalties sued for. While it is not an action in ejectment or one to quiet title, nevertheless she must allege and prove ownership of her interest in the land in order to show her ownership of the unpaid royalties, if any. In short, the essence of her action is that she owns certain royalties under the lease and Shell owes her for such royalties. As the owner of 1/2 of the royalties she attempts in one case to recover an undivided 1/10 of her royalties up to a certain time and in a subsequent suit to recover the balance. Thus, while

owning 1/2 of the royalties she attempts to recover part in one suit and the balance in another. We submit she cannot so split her cause of action.

In *Sweeney* v. *Coleman,* 69 Okl. 31, 169 Pac. 495, plaintiff brought an action claiming title to land, and lost. At the time this action was brought *he actually owned a life estate from another source of title* and attempted to prove this title in a subsequent suit. The court held the former judgment was *res judicata* even though the *issue as to the life estate was not raised* by the pleadings or evidence in the former suit.

It is therefore immaterial whether Nancy actually litigated her entire interest in the *Chisholm* case or not. The fact remains that she had only one cause of action for royalties due under the Linda Yarhola lease, and she litigated a portion of that cause of action in the *Chisholm* case. The *Chisholm* case now stands as *res judicata* not only as to those portions actually litigated, but also as to every other portion of the royalties claimed by her which accrued prior to the filing of the *Chisholm* case against Shell on November 2, 1942. *Tait, Collector of Internal Revenue,* v. *Western Maryland Railway Co.,* 289 U. S. 620, 77 L. ed. 1805; *Baker* v. *Leavitt,* 54 Okl. 70, 153 Pac. 1099; *Prince* v. *Gosnell,* 47 Okl. 570, 149 Pac. 1162; *Craig* v. *Broocks,* (Tex Civ. App.) (writ denied) 127 S. W. 572.

Nancy contended in the Court of Appeals that her present cause of action is separate and distinct from that which she asserted in the *Chisholm* case. In presenting this contention she erroneously based her argument on the difference in *Shell's defenses* instead of her cause of action. In each case her cause of action was one to recover royalties allegedly due and owing her under the provisions of

the same oil and gas lease. Her right to recover was based upon (1) her ownership of the property, and (2) Shell's obligation to pay royalties in accordance with the oil and gas lease. Ignoring this fact, she attempted to argue that (1) each case involved different trust agreements, *i. e.*, in the *Chisholm* case the subject-matter was Cussehta's trust agreements, while in the present case the subject-matter is her own trust agreements; and (2) each case involved different transfer and division orders, *i. e.*, the *Chisholm* case concerned transfer orders executed by Cussehta and his trustees, while this suit involves transfer and division orders executed by herself and her trustees.

Both of these arguments are patently unsound. In the first place it is obvious Nancy did not sue Shell in either suit on any trust agreements or any transfer or division orders. Actually, she contended in both cases there were no valid trust agreements, transfer orders, or division orders. She could not then and cannot now contend otherwise, because the record conclusively shows Shell has fully paid all royalties in accordance with the trust agreements and with the transfer and division orders. Hence, if she is suing on those instruments, she cannot recover in this action and this is true without regard to any question of *res judicata*. The record does not show any breach by Shell of those agreements.

Nancy has not even attempted to show any breach of the trust agreements or of the transfer and division orders on the part of Shell. This conclusively demonstrates that her cause of action was in no wise based upon such instruments. Shell admittedly complied therewith and if such instruments were valid Shell had valid defenses to Nancy's suit for royalties payable under the lease. Consequently, the validity of those instruments involved only the legal

sufficiency of our defense of payment. The fact that Shell may have relied upon different instruments in the *Chisholm* case and in this case to establish its defenses of payment in no wise alters Nancy's cause of action under the royalty provision of the Linda Yarhola lease.

In 1942, when the *Chisholm* case was filed against Shell, it would not have been necessary for Nancy to anticipate Shell's defenses by mentioning the Cussehta trust agreements or the Nancy trust agreements in order to state a cause of action against Shell. All she had to do to state a cause of action was to allege the execution of the oil and gas lease, its ownership by Shell, the fact that Nancy owned 1/2 the royalties due and payable under said lease, that such royalties had not been paid from April 28, 1924, to October 1, 1939, and that there was due and owing her a certain amount as royalty. A recital of the above facts would state a cause of action against Shell for all royalties allegedly due under the Linda Yarhola lease prior to the filing of the *Chisholm* case.

If the above petition had been filed Shell undoubtedly would have defended on the ground of payment. It would have set up the Cussehta trust agreements as to the interest obtained through inheritance from Cussehta and it would have set up the Nancy trust agreement as to the interest obtained directly from Linda. Nancy then undoubtedly would have replied that these trust agreements violated the 1926 Act and would have set up the other reasons she has alleged in contending these trust agreements were void. In such action the court would have passed upon the validity of these trust agreements, but the cause of action still would remain one for the recovery of royalties payable under the lease contract. The question of the validity of the trust agreements would only be pertinent to Shell's

defense of payment. If the trust agreements were found to be valid, then Shell's defense of payment would be good. On the other hand, if the trust agreements were found to be void, then the defense of payment might not be valid.

In concluding this proposition, we respectfully submit that it involves one of the simplest examples of *res judicata* —(*1*) identical plaintiffs (Nancy and the United States in her behalf); (*2*) the same defendant (Shell); (*3*) an identical cause of action for royalties payable under the same oil and gas lease; and (*4*) all royalties sued for were due and payable, if ever, prior to the filing of the *Chisholm* case against Shell. It is horn book law that it was the duty of plaintiff to include in the *Chisholm* case all matters germane to the issues which could or might have been litigated therein and that the *Chisholm* case is *res judicata* not only as to the royalties actually sued for, but also as to any and all other royalties allegedly due and payable under the terms of the Linda oil and gas lease which had accrued prior to the filing of the *Chisholm* case against Shell.

Point E.

Petitioner is estopped by the judgment in the *Chisholm* case from contending that the royalties payable under the Linda Yarhola oil and gas lease were restricted after the passage of the Act of April 12, 1926.

The *Chisholm* case involved payments of royalties under this same oil and gas lease. Nancy was one of the plaintiffs and Shell was one of the defendants. One of the issues was whether Section 1 of the Act of April 12, 1926, reimposed restrictions upon the payment of the royalties due under the Linda oil and gas lease in the absence of a regulation of the Secretary of the Interior restricting the payment of such royalties. In that case the Court of Ap-

peals held that royalties payable under the Linda lease after April 12, 1926, were not restricted funds and could be paid to the owners thereof or their nominees. *The issue of whether royalties payable under such lease after April 12, 1926, were restricted funds was adjudicated in the Chisholm case.* Regardless of whether the judgment in the *Chisholm* case on this point is correct, having once litigated this same issue in a suit between the same parties Nancy is now estopped to relitigate it. Nevertheless, her sole reason for applying to this Court for a writ of *certiorari* is that *the issue decided in the Chisholm case is contrary to prior decisions of this and other Federal courts.*

The Court of Appeals decided this case squarely on the authority of the *Chisholm* case, as shown by the final paragraph of its opinion, wherein it said:

> "Thus the judgment of the trial court is affirmed on the authority of the *Chisholm* case, * * *." (R. 466)

Nancy recognized this fact and on pages 19-20 of her brief *she attacks the decision in the Chisholm case* and claims it is contrary to the decision of this Court in *Parker* v. *Richard,* 250 U. S. 235, 63 L. ed. 954, and then states:

> "In *Chisholm* v. *House,* it was held (160 F. (2d) 647), that the 1926 Act did not reimpose restrictions previously promulgated by the Secretary's regulations and by him previously removed, and that the Act 'dealt solely with restrictions against alienation. It in no sense impinged on the right to receive payment of royalties under oil and gas leases. The restrictions with respect to the payment of such royalties, under the regulations promulgated by the Secretary of the Interior, had been removed by him, and could only be reimposed by action taken by him'."

While, as we have shown above, neither the decision in this case nor the decision in the *Chisholm* case is in

conflict with the decision in *Parker* v. *Richard, supra,* nevertheless, if it were we submit that Nancy is now estopped to raise this question. *She had an opportunity to appeal the Chisholm case to this Court, but did not do so. Right or wrong, the decision in that case is now final and the issues decided therein are binding upon her for all time.* She may not use this case to retry the issues determined against her in the *Chisholm* case.

In *Tait, Collector of Internal Revenue,* v. *Western Maryland Railway Co.,* 289 U. S. 620, 77 L. ed. 1405, this Court held that the Collector of Internal Revenue could not do what Nancy is attempting to do in the case at bar. In the *Tait* case the Court of Appeals for the Fourth Circuit held that certain deductions from gross income could be taken on the railway company's 1918 and 1919 income tax. *This decision was not appealed to this Court.* Similar deductions taken in 1923-1924 were disallowed by the Commissioner. The taxes were paid under protest, claim for refund filed and disallowed, and suit brought. The District Court found that *the collector was estopped* by the decision rendered in connection with the 1918 and 1919 taxes. The Court of Appeals affirmed the trial court and writ of *certiorari* was granted to this Court. In discussing the scope of the estoppel of a judgment, this Court said:

> "1. The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. * * * (2 c. 1407-1408)
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> * * * * * * * *

"• • • The very right now contested arising out of the same facts appearing in this record, was adjudged in the prior proceeding." (2 c. 1409)

• • • • • • • • •

"4. These views render unnecessary any consideration of the merits of the controversy." (1 c. 1410)

The *Tait* case is much stronger than the case at bar. While in the *Tait* case the parties were the same, the claim was different, since the 1923-1925 taxes were not due at the time the first case was tried, whereas in the case at bar the royalties payable to Nancy, if any, were due and payable prior to the filing of the *Chisholm* case. Nevertheless, this Court held in the *Tait* case that, *regardless of the merits of the case,* the Collector of Internal Revenue was estopped by the prior judgment from contending that the railway company could not take the deductions complained of in 1923-1925. So in the case at bar. Even if it be assumed, contrary to the facts, that the royalties sued for in this case did not accrue until after the *Chisholm* case had been decided, nevertheless Nancy would now be estopped by the *Chisholm* case from contending as against Shell that the 1926 Act reimposed restrictions upon the payment of royalties accruing under the Linda oil and gas lease. Using the language of this Court in the *Tait* case and applying it to this case:

"The very right now contested arising out of the same facts appearing in this record, was adjudged in the prior proceeding." (2 c. 1409)

and

"These views render unnecessary any consideration of the merits of the controversy." (1 c. 1410)

Conclusion.

In conclusion, we respectfully submit that this case is not a proper one for review by *certiorari* in this Court, and that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

GEO. W. CUNNINGHAM,
Box 1191,
Tulsa 2, Oklahoma,
Attorney for Respondent.

Of Counsel:
JESSE M. DAVIS,
Box 1191,
Tulsa 2, Oklahoma.